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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, Petitioner

v.

ERIC M YOUNG, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA FIRST DISTRICT
COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI
and
APPENDIX

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QUESTION PRESENTED

Whether the exclusionary rule requires evidence seized by law enforcement to be suppressed when the search is conducted at the request of, and with the consent of, the defendant's private employer after the private employer has discovered illegal activity.

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OPINION BELOW

The opinion of the Florida First District Court of Appeal on motion for rehearing and certification below is published at State v. Young, 974 So. 2d 601 (Fla. 1st DCA 2008). (App. A). The State filed both a motion for rehearing and a motion for rehearing en banc in the district court. The Florida First District denied both, but substituted the aforementioned opinion on its own motion. The State moved to invoke the jurisdiction of the Florida Supreme Court, which declined jurisdiction. (App. B).

JURISDICTION

The judgment of the Florida First District Court of Appeal was entered on February 25, 2008. The order of the Florida Supreme Court declining jurisdiction was entered on July 11, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The State charged Respondent, Pastor Young (hereinafter Young), with possession of child pornography as a result of a video, amongst other pornographic material, located on the hard drive of his workplace computer entitled "3yogetsraped." (SR vol. I, Part II; SRII 1).[1]

Young, the pastor at the Fort Caroline United Methodist Church was one of three full-time and several part-time staff. (RI 51). The pastor's office, had a separate key, however, there were three copies of that key. (RI 52). Young possessed two copies and the third copy remained in the church office in the custody of the office administrator in case the pastor or someone else needed to enter the office. (RI 52).

The office administrator testified she had provided Young's wife with access to the computer in the pastor's office when he was not present. (RI 63-64). Additionally, the church trustees or staff parish would have the right to use the third key. (RI 54). The church had no written policy regarding the use of the third key, (RI 53), nor did Young have any written policy regarding access to his office. (RI 191). The office administrator could come and go from his office freely, if Young was present. When he was not, the office administrator would enter his office "if she had to deliver paperwork for me to sign, that would

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[1]Citation to SR and R are references to the matters contained in the original record on appeal.

be a reasonable business sort of thing for her to do" and the custodian was let into his office to clean by the church administrator. (RI 173).

The church purchased the computer it owned, that was kept in the pastor's office in May 2004, and paid for an internet connection through BellSouth. (RI 61-62). Testimony revealed, the office administrator served as the contact person for BellSouth regarding internet service, including changing e-mail addresses and user names. (RI 62-63). Young admitted that the office administrator had the authority to come into the pastor's office and conduct internet repairs. (RI 185). Young agreed that looking at pornography constituted using the computer for non-church purposes and unauthorized activity. (RI 184-85). Young further admitted that no one at the church ever indicated to him that they could not go into his office to look at the computer. (RI 134). Young's computer was not password protected, and he did not keep his counseling notes on the computer. (RI 56, 134, 140).[2]

On June 15, 2005, the church's office administrator received a call from BellSouth

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[2] For example, when a problem previously occurred with the internet service at the church, (RI 64), pursuant to BellSouth's request, the office administrator checked each computer at the church, including the one in Young's office, to ascertain whether the problem had been fixed. (RI 64-65). In fact in March 2005, the office administrator shipped Young's computer from his office for repairs. (RI 65).

related to spam from the church's internet protocol address. (RI 66). As a result of the conversation, the ffice administrator accessed her computer and Pastor Young's computer to run a program called Spybot, which returned "some very questionable web site addresses" on only Pastor Young's computer. (RI 67-68).

Reverend Neal, the church's district superintendent who had oversight of Young's activities, was told about allegations of improper computer use on June 22, 2005. (RI 79). Specifically, Neal was told that the church had received a complaint from BellSouth indicating that child pornography traffic had been tracked to the church. An expert came in and determined that the computer had pornographic material on it. (RI 80).

Reverend Neal discussed the matter with the bishop and, pursuant to that conversation, authorized Mr. Moreland, the chairman of the staff-parish committee, to notify "the authorities that we had a problem and allow them to see the computer." (RI 80). Reverend Neal further told Mr. Moreland to authorize the search of the church buildings and turn over the church computers, including Young's computer. Mr. Moreland subsequently gave law enforcement consent to search. (SRI 84).

Reverend Neal, as district superintendent pursuant to the United Methodist Church Book of Discipline, contacted Young and informed him not to handle the computer and "suggested" Pastor Young

"not go into the office but return home" until Reverend Neal could speak with him. (RI 81). Reverend Neal later spoke to Agent Roman and confirmed that law enforcement had permission to examine the computer. (RI 83-84).

Detective Boymer was contacted by a patrol officer regarding a complaint from the church. (RI 124). Boymer spoke with church officials and enlisted the assistance of Agent Roman, to help in handling the matter. (RI 97, 99, 124, 126). Boymer and Roman both received consent to search from Moreland, who stated that he had authority to consent to the search from his supervisors in the church. Neither Boymer nor Roman obtained a search warrant. (RI 110, 142).

Agent Roman learned that an IT person found what he believed to be images of child pornography on the computer in Young's office. (RI 101). The IT person burned a copy of some of the images and provided the CD to the church. (RI 101). Roman also spoke with the office administrator, who conveyed similar information. (RI 102). Finally, Roman spoke to Reverend Neal during the search, who stated that the church's position was "to fully cooperate with the investigation," and that Mr. Moreland would assist them with whatever they needed. (RI 102-03).

As a result of Roman's request for permission to search the office and computer, Moreland let them into the office. (RI 103). Moreland signed the written consents to search the computer. (RI 103).

While inside Young's office, Roman seized papers from in or next to the trash can, which contained handwritten notations "http://cutie.does.it" and "www.videoteenage.com" along with a user name and password. (RI 106).

Pretrial, the trial court granted Young's motions to suppress, (RI 27, 34, 35-39), concluding that "[t]he issue presented is whether the officials of the United Methodist Church involved in this case who consented to the search of the office and computer had lawful authority to consent in the absence of consent by the Defendant." (RI 37). In concluding the officials had no authority, the trial court reasoned:

> The law enforcement officers knew that they were investigating possible criminal activities by the Defendant, not the church....
>
> As pastor of the church, the Defendant had a reasonable expectation of privacy in the pastor's office and the computer provided for his exclusive use. The church did not have a policy or practice which would cause the Defendant to believe that the office or computer might be searched without his consent so long as he served as pastor. He had standing to object to the search of the office and computer. Although the church officials involved

> in this case requested law enforcement involvement and clearly consented to the search under authority granted by The Book of Discipline, the rules of church contained therein do not cause the Defendant to lose rights under the constitutions of the United States and the State of Florida.

(RI 38).

The State appealed and the Florida First District Court of Appeal affirmed the granting of the motion to suppress the evidence seized. State v. Young, 974 So. 2d 601, 606 (Fla. 1st DCA 2008). The appellate court noted that under Article I, section 12 of the Florida Constitution, it was required to resolve all Fourth Amendment issues under the United States Constitution as interpreted by this Court. See id. at 608.

The state appellate court held that Young must establish that he had standing under the Fourth Amendment by demonstrating that he possessed a reasonable expectation of privacy in the area searched or item seized. See Young, 974 So. 2d at 608. With respect to the workplace computer, the court noted "the reasonableness of an employee's expectation of privacy in his or her office or the items contained therein depends on the 'operation realities' of the workplace." Id. (quoting O'Connor v. Ortega, 480 U.S. 709, 717 (1987))(citing Mancusi v. DeForte, 392 U.S. 364, 369 (1968)). Further, "[t]he

likelihood that a person has an objectively reasonable expectation of privacy in an office setting is increased where the area or item searched is 'reserved for [the defendant's] exclusive personal use.'" Id. (alteration in original)(quoting Mancusi, 392 U.S. at 369). Additionally, the court cited the case of United States v. Anderson, 154 F.3d 1225, 1232 (10th Cir. 1998), and listed other factors useful in determining the legitimate expectation of privacy in an office, including "the employee's relationship to the item, whether the item was in the employee's immediate control when it was seized, and whether the employee took actions to maintain a sense of privacy in the item." Id. The court determined that "[e]valuation of an expectation of privacy in a workplace computer involves unique considerations, but as with any other item in the workplace, the evaluation should focus on the operational realities of the workplace." Id. at 608-09. The court continued stating, "[w]hen a computer is involved, relevant factors include whether the office has a privacy policy regarding the employer's ability to inspect the computer, whether the computer is networked to other computers, and whether the employer (or a department within the agency) regularly monitors computer use." Id. at 609. The court cited the decisions of the federal circuit courts in United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) and Muick v. Glenayre Electronics, 280 F.3d 741, 742 (7th Cir. 2002). See id.

The court held that once a legitimate expectation of privacy is established, then the State

"must prove that the search and seizure was reasonable in order to use the evidence secured in the search and seizure at trial." Young, 974 So. 2d at 609. The court stated that a "search and seizure is reasonable if it is conducted pursuant to a valid warrant or with valid consent" and further found that consent must be obtained from the individual whose property is searched, a person with common authority over the premises, or someone who reasonably appeared to have common authority over the premises, citing Illinois v. Rodriguez, 497 U.S. 177, 181, 188-89 (1990). Id.

Utilizing the definition of common authority from Rodriguez, the court found common authority resulted from mutual use and joint access for most purposes. See id. The court relied on United States v. Matlock, 415 U.S. 164, 171 (1974), to establish that the basis of this rule is essentially that one party assumes the risk that the other will permit the area to be searched. See id. The court rejected the statement in United States v. Zeigler, 474 F. 3d 1184, 1191 (9th Cir. 2007), which provided that "the computer is the type of workplace property that remains within the control of the employer 'even if the employee has placed personal items in [it].'" Young, 974 So. 2d at 609. The court found that the court in Zeigler relied on the specific facts of the case such as the company had an IT department with complete administrative access to the company's computers, had a firewall to monitor internet traffic, and an employment manual informing employees of the monitoring efforts. See id. at 610. With respect

to the apparent authority doctrine, the court indicated that in some cases where the person consenting to the search may not have actual authority, law enforcement may rely on the person's apparent authority to give consent. See id. The court noted that the reliance must be reasonable. See id.

The court finally stated that "[i]f the State fails to prove a search and seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial." Young, 974 So. 2d at 611 (citing Wong Sun v. United States, 371 U.S. 471, 484 (1963)). As a result, the court determined that Young had a legitimate expectation of privacy in his office and workplace computer. See id. The court found that the totality of the circumstances, including the fact that Young kept his office locked when he was away and it was used by others for only limited purposes, indicated that he "expected no one to peruse his personal belongings in the office or on the computer." Id. Additionally, the court concluded that this expectation was one that society was prepared to recognize. See id. The court found "that the church endowed [Young] with an expectation of privacy far beyond that which an average employee enjoys" because the church installed a special lock on the door, Young allowed visitors into his office for only limited church purposes or with his permission, and because he was the sole regular user of the computer. See id. The court stated that although the church administrator performed maintenance on the computer, neither

she nor anyone else, stored files on or used the computer. See id. The court also found that the church had no written policy regarding the use of the computer. See id.

While the district superintendent had the authority to enter the office and inspect the computer under the provisions of the Book of Discipline, the court observed "that this general authority to supervise a pastor is distinguishable from an explicit policy indicating that a computer will be inspected periodically." Young, 974 So. 2d at 612. The court concluded that "this authority did not displace the law enforcement officers' obligation to respect [Young's] independent constitutional rights and it did not rise to the level of 'common authority' required for valid third party consent." Id. The court based this conclusion on the fact that neither Moreland nor the District Superintendent ever used the computer, worked in the office, or kept property there. See id.

The court held that the officer's actions did "not support a finding of apparent authority." Id. The court determined that the officers knew nothing of Moreland other than the fact that he was a church representative who had been told by a supervisor to consent to the search. See id. The officers were required "to ascertain whether the consenting officials had any regular access to or control over the office and the computer before commencing the search," and found that the officers' actions "were not reasonable under constitutional standards." Id.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The burgeoning prosecution of cybercrimes necessitates that clear and well thought through Fourth Amendment analysis is applied to workplace crimes. Thus while this case presents what appears facially to be a simple question of whether a private employer has the right to investigate employee misconduct and request the assistance of law enforcement once it has found suspicious activity, this area of the law has not been specifically considered by the Court. The absolute necessity of computer usage in the private workplace and the growth of crimes related to internet usage mandates clear guidelines and standards in applying the Fourth Amendment. State and federal courts should not be left to cobble together Fourth Amendment decisions which thus far have provided little or no guidance to employers and law enforcement officers. Additionally, in this case, the Florida court completely disregarded prior Supreme Court precedent when it indiscriminately applied the exclusionary rule.

The Search of a Workplace by a Private Employer or Its Designee and the Involvement of Law Enforcement at the Private Employer's Request Does Not Implicate the Protections of the Fourth Amendment

The Court has not squarely addressed the parameters of permissible intrusion into the workplace by law enforcement at the request of the private employer. Private employers, such as the United Methodist Church, should and are permitted to inspect the computers of their employees without satisfying the prerequisites imposed by the Fourth Amendment because they are not government actors. Despite this tenant, the Florida appellate court rejected that principle and concluded that a violation of the Fourth Amendment occurred when Pastor Young's computer was subsequently searched for pornographic material. It is apparent that without clearly established precedent, the federal and state courts have been left to divine a variety of results in similar circumstances which have been accomplished through general extrapolation and cobbling of decisions of the Court.

Perhaps the best approach has been utilized by the New Hampshire Supreme Court in State v. Collins, 581 A.2d 69, 72-73 (N.H. 1990), adopting a Matlock based analysis. Interpreting Matlock and its application in the employer-employee relationship context, that court found that the State is "entitled to show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (citing Matlock, 415 U.S. at 171)(emphasis added). The court noted that because of the factual situation in Matlock, the Court did have to examine the "other sufficient relationship" and its applicability. See id.

In Collins, the rights of the employer to give consent to search resulted from the employer's ownership of the vehicle and his employment of the defendant. See id. The court found that "[e]ntrusting a truck to an employee does not, without more, imply any limitation on the employer's continuing right to deal with the truck as he sees fit or to allow others to have access to it." Id. The defendant argued that the fact that he had the exclusive right to use the vehicle should result in the conclusion that the employer could not consent. See id. The court rejected the argument stating that this proved "nothing more than the defendant's authority, derived from his employer, to control the access of other employees to the vehicle." Id. The court also found that even though the employer did not use the vehicle, "his inactivity does not reasonably imply an agreement with his employee to observe some limitation on his rights as an owner of business property to deal with it in whatever way he might think appropriate." Id.

The New Hampshire court evaluated the additional fact that Collins had permission to use the vehicle for personal reasons. The court stated that until the employer's "permission was revoked and its revocation communicated to the employee, it would be arguable that the employee could assume that the employer would not open the building or vehicle to the police simply to facilitate a criminal investigation unconnected with the employment relationship." Id. However, the court concluded:

> Such an expectation that the employer would not enter or permit a police search would be wholly unreasonable, however, as against an employer with reason to believe that the employee's space in the building or vehicle itself had been used in the course of committing a crime, especially if the victim was the employer's customer whom it was the employee's duty to serve. An employee could hardly infer that a right to make personal use of a vehicle carried the implication that his employer had somehow barred himself from giving the police access to a business instrumentality that he had reason to believe the employee had used in breach of his employment obligation as well as of the criminal law.

Id. (emphasis added).

The court found that the employer had duties to his tenants which were:

> distinct from and independent of any citizen's general obligation to aid in the detection of crime. The employer's own interest is thus identical with the interest of the government in detecting crime, and in these circumstances, no employee could sensibly understand

> his employer to have limited his own power to detect crime in his own business by placing business property off-limits to the police, simply because the employee was allowed to make personal use of that property when he was not using it to discharge his assigned business responsibilities.

Id. As a result, the court found that the consent to search provided by the employer was sufficient. See id.

Mindful of this Court's decision in Matlock, 415 U.S. at 171, the federal circuit courts for the Fourth and Seventh Circuits have applied a "Matlock-like" analysis looking to the relationship between the private employer and employee and the item seized to determine whether a Fourth Amendment violation has occurred.

In United States v. Carter, 569 F.2d 801, 803 (4th Cir. 1977), the Fourth Circuit upheld the denial of a motion to suppress evidence where the employer had consented to the search of an employer owned vehicle assigned to and exclusively utilized by the defendant. Applying the Matlock "other sufficient relationship test," the court evaluated the sufficiency of the employer's consent. While recognizing that the ownership of the vehicle was not alone sufficient to justify the employer's consent to search, the court found that the ownership of the vehicle could not be ignored because it formed the basis of the

relationship between the defendant and the employer. See id. The court stated:

> Because of that relationship, Carter could not expect to use the vehicle free from inspection by either his employer or by the police acting with his employer's consent.
>
> Carter was assigned the truck for use in the performance of his duties as an employee.... Escann, as owner of the business, could tell Carter what he could do, or what he could not do, with the company's vehicle. Even though he was allowed to take the truck home at night, Carter was not authorized to use the truck for any purpose unconnected with the business. Moreover, Escann, at his caprice, could reassign the van to another employee. Clearly, the defendant used the vehicle solely at the owner's sufferance.

Id. Thus, the court concluded that "'every circumstance points inescapably to the conclusion that the searching officers acted in perfect good faith in relying on the authority' of the owner of the vehicle." Id. (quoting U.S. v. Peterson, 524 F.2d 167, 180 (4th Cir. 1975).

Similarly, the Seventh Circuit in United States v. Bilanzich, 771 F.2d 292, 296 (7th Cir. 1985), found

that a co-owner of a hotel could give valid consent to search a business office where the defendant, the hotel manager, kept the hotel's books and performed her managerial duties, despite the fact that he did not have a key, using the Matlock standard. The hotel owner had to request that the defendant give him access to the room, but the items seized were located in an unlocked desk and file drawers. See id. The court agreed that the defendant "'confuse[d] office routine and practice with the concept of possessory rights giving rise to an expectation of privacy.'" Id. The court held that "the owner of a business who exercises authority over a management employee has the authority to consent to a search of the business' premises, including all employee offices, for records relating to the business." See id.

In contrast to its decision in Bilanzich, rather than utilizing its previous Matlock based approach, the Seventh Circuit utilized this Court's decision in O'Connor, which involved actions by a public employer, to reach its determination in Muick, 280 F.3d. Muick was arrested for receiving child pornography. At the request of law enforcement, the employer, Glenayre, seized the laptop that it had issued to Muick for use at work. See id. Judge Posner, writing for the Seventh Circuit, stated that "Muick [the employee] had no right of privacy in the computer that Glenayre [the employer] had lent him for use in the workplace." Id. at 743. Judge Posner continued that "[n]ot that there can't be a right of privacy (enforceable under the Fourth Amendment if the employer is a public entity, which Glenayre we

have just held was not) in employer-owned equipment furnished to an employee for use in his place of employment." Id. The court noted that if an employer furnished a receptacle, like a safe, in the employee's office for keeping the employee's private documents, then the employee "can assume that the contents of the safe are private." Id. (citing O'Connor, 480 U.S. at 718-19).

Rather than utilizing either a Matlock based approach or a purely O'Connor based analysis, the Tenth Circuit applied a case-by-case analysis utilizing both this Court's decision in O'Connor and its decision in Anderson to reach its decision in Angevine, 281 F.3d at 1132. The court reviewed the claim of a professor, who had been provided a computer pursuant to his employment at Oklahoma State University, where the university had a policy on the use of its computers. See id. at 1132-34. The professor's computer had been networked with other university computers and used to download 3000 pornographic pictures involving young boys. See id. at 1132.

The Angevine court recognized the O'Connor decision and noted that an employee's expectation of privacy is addressed on a case-by-case basis. See id. at 1134. The court set forth factors to be considered included: "'(1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item.'" Id. (quoting Anderson, 154

F.3d at 1229). The court found that the computer use policy prevented Angevine from having any reasonable expectation of privacy in the computer. See id. The court also found that this court's Mancusi decision was not applicable because Angevine did not have custody of the data at the moment of its seizure as he had deleted it. See id. at 1135.

Finally, the Ninth Circuit in Zeigler, 474 F.3d, used both the O'Connor approach to determine the reasonable expectation of privacy component and Matlock to determine whether an employer could consent to the search. The Zeigler court evaluated whether an employee had an expectation of privacy in his workplace computer, such that images of child pornography were properly suppressed. See Zeigler, 474 F.3d at 1185. The owner of Frontline, a private company, contacted the FBI with a tip that an employee had accessed child pornography websites from a workplace computer. See id. at 1185-86. The FBI agent contacted Frontline's internet technology ("IT") administrator and learned that the company had in place a firewall to monitor all employee internet activity. See id. The FBI agent confirmed the information provided to him by the owner, and the IT employee stated that he had viewed the websites accessed by Zeigler, which contained pictures of very young girls. See id. The IT administrator further told the FBI agent that a monitor had been placed on Zeigler's computer to record its internet traffic. See id.

At some point, Frontline made a copy of Zeigler's hard drive. See id. The record contained disputed facts as to whether this was done at the request of the FBI agent or not. See id. Thereafter, counsel for Frontline contacted the FBI agent and indicated it would cooperate fully in the investigation. See id. at 1187. Frontline's counsel indicated that it would voluntarily turnover Zeigler's computer to the FBI and did so. The FBI found child pornography on the computer. See id.

On appeal, Zeigler argued that his office computer was like the desk drawer or file cabinet which had been given protection in cases like O'Connor, 480 U.S. See Zeigler, 474 F.3d at 1188. Citing Katz v. United States, 389 U.S. 347, 351 (1967), the Zeigler court noted that the Fourth Amendment protects people rather than places. See id. at 1189. The court stated that "a criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a *legitimate* expectation of privacy in the place searched or the item seized." Id. (citing Smith v. Maryland, 442 U.S. 735, 740 (1979))(emphasis in original). The court continued that "[t]his expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy." Id. (citing Smith, 442 U.S. at 740, and Katz, 389 U.S. at 351, 361). The court concluded that Zeigler had the burden to prove both elements. See id.

In Zeigler, the government did not contest

Zeigler's claim that he had a subjective expectation of privacy in his office and computer. See id. Zeigler established that he used a password on the computer and had a lock on his office door. See id. The court noted that Zeigler's expectation of privacy in his office also had to be objectively reasonable. See id.

Since no warrant had been obtained, the court required the government prove that consent had been obtained. See Zeigler, 474 F.3d at 1190-91. The court applied the Matlock holding permitting consent to come be obtained from a third party. See id. at 1191. The court evaluated the ability of Frontline to validly consent to the search under the Mancusi decision. See id. Noting that this Court stated in Mancusi, 392 U.S., that DeForte's expectation of privacy in his office and items seized was based upon the expectation that the records would not be seized without his permission or the permission of his supervisors, the Zeigler court concluded that his "interest may be subject to the possibility of an employer's consent to search of the premises which it owns." Id. The court found that Frontline could validly consent to the search of the "workplace computer because the computer is the type of workplace property that remains within the control of the employer 'even if the employee has placed personal items in [it].'" Id. (quoting Ortega, 480 U.S. at 716)(alteration in original).

The Zeigler court explained that the workplace computer is different from a piece of closed personal luggage brought into the workplace.

See Zeigler, 474 F.3d at 1191. The court found that even though each computer had an individual log-in, the IT department had administrative access to the computers. See id. The court also found that the company had installed firewalls monitoring internet traffic. See id. The court additionally stated that the company had told its employees that the computers were for business use and the computers were not to be used for personal purposes. See id. The court concluded that Zeigler

> could not have reasonably expected that the computer was his personal property, free from any type of control by his employer. The contents of his hard drive, like the files in Mancusi, 392 U.S. at 369, were work-related items that contained business information and which were provided to, or created by, the employee in the context of the business relationship. Zeigler's downloading of personal items to the computer did not destroy the employer's common authority.

Id. at 1192-93. Therefore, the employer could consent to the search of the office and the computer. See id. at 1193.

Just as the Florida court has done here, the federal courts have failed to keep a clear distinction between public and private employers and their actions. In other cases, the courts have analyzed the

private employer's ability to consent under the standards announced in Matlock. The resolution of the question presented in this case is important to smaller businesses and to businesses without extensive work place regulations. Currently, private employers and law enforcement have been placed in an untenable situation because they lack necessary guidance as to the measures they may take to stop criminal activity in the workplace. Worse yet, the decision of the Florida court has left, in this instance, the church without any authority to stop its employees from utilizing work place computers to traffic in child pornography. The Court should accept this case to settle the question of whether a private employer may consent to the search of employer owned property which has been provided to an employee for his use, thereby settling the uncertainty in this area of the law.

The Florida Court Indiscriminately Applied the Exclusionary Rule Without Undertaking the Analysis Required by This Court's Precedent.

The Florida court moreover failed to comply with this Court's pronouncements in United States v. Leon, 468 U.S. 897 (1984), and the more recent decision in Hudson v. Michigan, 547 U.S. 586 (2006), specifically rejecting the "indiscriminate application" of the exclusionary rule. Review is warranted in this case to clarify that application of the balancing test is required rather than an indiscriminate application of the exclusionary rule

without evaluation of the societal costs of suppressing evidence compared to its deterrent effect.[3]

In Leon, the Court explained the evolution and purpose of the exclusionary rule stating:

> The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "[works] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. 338, 354 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, ibid., and the exclusionary rule is neither intended nor able to "cure the

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[3]The Florida courts, which are required to resolve Fourth Amendment issues under the United States Constitution as interpreted by this Court, often fail to apply the balancing test as required. For instance, recently in Baptiste v. State, SC07-1453, 2008 Fla. LEXIS 1614 (Fla. September 18, 2008), Justice Wells pointed out in his dissent that the majority failed to undertake the essential two part evaluation required by this Court's precedent, that being first whether a violation of the Fourth Amendment occurred and second application of the Leon and Hudson analysis. See also State v. Campbell, 948 So. 2d 725 (Fla. 2007)(review dismissed)(Justice Wells dissenting and cautioning that not every violation of the Fourth Amendment requires the application of the exclusionary rule).

> invasion of the defendant's rights which he has already suffered." Stone v. Powell, [428 U.S. 465, 540 (1976)] (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, supra, at 348.

Id. at 906 (emphasis added).

> Whether the exclusionary sanction is appropriately imposed in a particular case... is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, [462 U.S. 213, 223 (1983)].

Id. (emphasis added). As to the mandate to apply the rule from Leon, this Court stated:

> "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 734

(1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Stone v. Powell, 428 U.S., at 490. Indiscriminate application of the exclusionary rule, therefore, may well "[generate] disrespect for the law and administration of justice." Id., at 491. Accordingly, "[as] with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." United States v. Calandra, supra, at 348; see Stone v. Powell, supra, at 486-487; United States v. Janis, 428 U.S. 433, 447 (1976).

Id. at 907 (footnote omitted)(emphasis added).

And in Hudson, 547 U.S. at 591-599, this Court urged that exclusion must not be posited based solely on the fact that a constitutional violation

occurred, but must rather be evaluated by balancing the societal costs of suppressing evidence as compared to the deterrence benefits.

The Florida court failed to comply with the Court's holdings in Leon and Hudson, as it articulated that "[i]f the State fails to prove a search and seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial." Young, 974 So. 2d at 611 (citing Wong Sun v. United States, 371 U.S. 471, 484 (1963)).

Applying the balancing test here, the outcome favored not excluding the evidence.

The Florida court's decision excluded the evidence despite the fact that the church, as the computer's owner, could have simply taken the computer during its search of the pastor's office, turned it over law enforcement, and no Fourth Amendment violation could have been alleged. See Burdeau v. McDowell, 256 U.S. 465, 475 (U.S. 1921); Coolidge v. New Hampshire, 403 U.S. 443, 489-90 (U.S. 1971).

Even assuming a constitutional violation occurred, there was, and is, no remedial purpose served by the suppression of the evidence. Rather, the decision unduly discourages citizens, such as the church employees and members, and the church itself from reporting crime and aiding in the

apprehension of a criminal. Because the Florida court's decision "offends basic concepts of the criminal justice system," the Court should accept certiorari in this case.

CONCLUSION

Therefore, for the foregoing reasons, Petitioner respectfully requests this Court grant the petition for certiorari and establish clear guidance for the lower courts, employers and law enforcement as to the application of the Fourth Amendment in cases involving private employer requests for the assistance of law enforcement once the private employer has uncovered what it believes to be criminal wrongdoing. At a minimum, Petitioner requests this Court accept certiorari and reverse the decision of the Florida court and mandate the lower court properly apply the balancing test required by this Court in United States v. Leon, 468 U.S. 897 (1984), and Hudson v. Michigan, 547 U.S. 586 (2006).

Respectfully submitted,

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA

Petitioner,

vs.

ERIC M. YOUNG,

Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

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APPENDIX

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No. _____

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 1D06-5798

ERIC M. YOUNG,

Appellee.
_____/

Opinion filed February 25, 2008.

An appeal from the Circuit Court for Duval County. Henry E. Davis, Judge.

Bill McCollum, Attorney General, and Christine Ann Guard, Assistant Attorney General, Tallahassee, for Appellant.

Curtis S. Fallgatter of Fallgatter Farmand & Catlin, P. A., Jacksonville, for Appellee.

ON MOTION FOR REHEARING AND CERTIFICATION

LEWIS, J.

We deny the State's motion for rehearing and certification. On our own motion, however, we

withdraw our previous opinion and substitute the following.

The State of Florida seeks review of an order granting Eric Young's motion to suppress evidence gathered during a warrantless search of his office and workplace computer, as well as statements obtained from him in a subsequent interrogation. Although Young did not personally consent to the search, the State contends that the search was reasonable under one or all of the following theories: (1) Young had no legitimate expectation of privacy in the office or computer, (2) church officials who consented to the search had authority to do so, and (3) the officers who conducted the search reasonably relied on the church officials' apparent authority to consent. The State also contends that Young's statements were not a product of the search and, therefore, should not have been suppressed in any event. We reject all of these contentions and affirm the order.

At the time of the search, Young was the pastor of Ft. Caroline United Methodist Church ("the church"), a local church under the supervision of the larger United Methodist Church ("the Church"). In the proceedings below, Richard Neal, a district superintendent of the Church, testified regarding the Church's structure, as it related to Young's employment. According to Neal's testimony, the Church is divided into geographical sections known as conferences, and a bishop presides over

each conference. Neal explained that bishops appoint pastors after consulting with district superintendents, who supervise the pastors and local churches within their districts. Neal further testified that the Church is governed in accordance with its Book of Discipline and that all pastors agree to be bound by this book when they are ordained.

Young's church was relatively small, with only three full-time staff members: the pastor, a custodian, and a person who served as both the church administrator and the pastor's secretary. Additionally, there was a body within the church known as the staff parish. The church administrator described the staff parish as "the human resources of the church," or the personnel. Although the record is unclear as to the role or authority of the staff parish, the chairperson of staff parish relations testified via deposition that he was not Young's boss or supervisor.

The church provided Young with a desktop computer and a private office. Although the computer was provided to Young for use in connection with his duties at the church, there was no official policy regarding the use of the computer or others' access to it. Young's computer was not networked to any other computer, and it was kept in his private office. This office had a special lock that could not be opened with the Church's master key. Three keys to Young's office existed. Young kept two of the keys, and the church administrator kept the third key, which she stored in a locked credenza drawer in her office.

According to Young's testimony, a previous pastor had requested the special lock for the office door due to concerns about after-hours intruders. The church administrator testified that she regularly opened the door to Young's office for the custodian and visiting pastors, who occasionally used the office to prepare sermons. However, the church administrator acknowledged that no one was permitted to enter the office without Young's permission. Young testified to this fact himself and added that when he was absent from the office, even the church administrator's access was limited to reasonable business purposes, such as "deliver[ing] paperwork for [him] to sign." Young further testified that the church administrator was not permitted to log on to his computer when he was not physically present.

The events leading to the search of Young's office and computer began when the church administrator received a call from the church's Internet service provider. A representative from that company informed the church administrator that spam had been linked to the church's Internet protocol address. In response to this call, the church administrator ran a "spybot" program on the church's computers. She testified that when she ran the program on Young's computer, she saw "some very questionable [w]eb site addresses." The church administrator then contacted a member of the staff parish and an information technology (IT) person to set up a time to have the computer examined.

Later, the chairperson of staff parish relations, Kenneth Moreland, contacted Neal to inform him of the situation. After discussing the matter with the bishop and getting approval for the decision, Neal instructed Moreland to contact law enforcement officials and allow them to see the computer. The next morning Neal instructed Young not to return to the church until the two could meet and discuss the situation. When officers arrived at the church, Moreland unlocked Young's office and signed "consent to search" forms for the office and computer. Young arrived at the church during the morning when the officers were there. Moreland and an officer instructed Young to leave the property immediately, and he complied.

The two officers who were involved in obtaining consent to search the office and computer testified at the suppression hearing. Both testified that at the time of the search, they understood Moreland to be a "representative of the church" whose authority to consent was based on instructions from a supervisor at the church. Neither of these officers spoke with Moreland's supervisor or asked Moreland further questions about his authority before the search began. One officer testified that she had spoken directly with Neal after she was already inside Young's office. At the time, she knew Neal had never used Young's computer, did not work in Young's office, and did not keep property there. Neal's testimony at the hearing revealed the same information. Similarly, Moreland testified that he did not work in Young's office and did not keep

belongings there. However, Neal testified that he had authority to consent to the search and to instruct Young to stay away from the church under the Book of Discipline, by which Young had agreed to be bound when he was ordained.

After searching the office and computer, officers went to another location where Young was meeting with Neal. At that time, an officer advised Young of his Miranda rights,[4] and Young indicated he was willing to talk. During the interview, the officer showed Young a printout from his computer, which contained a list of Web sites Young had bookmarked. The transcript of the interview indicates that the officer was looking at the printout while questioning Young. During the course of the interview, Young made statements relevant to whether he had a subjective expectation of privacy in his office computer. In particular, when the officer asked, "You have no right to privacy on that computer?," Young responded, "I suppose not . . . I hadn't really thought about it." The officer then stated, "It's like me, . . . my laptop in my truck, if my boss says hand it over, he can look at anything that's on there because it's not mine." Young replied, "I suppose technically you're right." He also made incriminating statements related to child pornography and signed a form giving the officers consent to search a "memory stick" found in his office. Young testified that during the interview, he understood that the officers had been in his office. Statements made by the officer during the

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[4]Miranda v. Arizona, 384 U.S. 436, 479 (1966).

interview are consistent with this testimony.

After two hearings, the trial court granted the motion to suppress, finding that, although Neal had authority to consent to the search under the Book of Discipline, he did not have authority to consent under the constitutions of the United States and Florida. The court concluded that the search and seizure was unlawful and that Young's statements were a product of the unlawful search and seizure. Thus, the trial court held that the items seized in the search and the statements taken in the interview could not be used as evidence at trial.

We consider the Fourth Amendment issues presented in this case under the requirements of the Federal Constitution, as interpreted by the United States Supreme Court. See Art. I, § 12, Fla. Const.; State v. Butler, 655 So. 2d 1123, 1125 (Fla. 1995). We review the trial court's factual findings to determine whether they are supported by competent substantial evidence, but its application of law to facts is reviewed de novo. See Williams v. State, 721 So. 2d 1192, 1193 (Fla. 1st DCA 1998). Recognizing that a trial court's ruling on a motion to suppress is "clothed with the presumption of correctness," we "interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to the trial court's ruling." McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978).

To invoke the protection of the Fourth Amendment, a criminal defendant must establish

standing by demonstrating a legitimate expectation of privacy in the area searched or the item seized. Smith v. Maryland, 442 U.S. 735, 740 (1979). A legitimate expectation of privacy consists of both a subjective expectation and an objectively reasonable expectation, as determined by societal standards. Smith, 442 U.S. at 740. The reasonableness of an expectation of privacy in a particular place or item depends on context. O'Connor v. Ortega, 480 U.S. 709, 715 (1987). Specifically, the reasonableness of an employee's expectation of privacy in his or her office or the items contained therein depends on the "operational realities" of the workplace, id. at 717, and not on legal possession or ownership. Mancusi v. DeForte, 392 U.S. 364, 369 (1968). The likelihood that a person has an objectively reasonable expectation of privacy in an office setting is increased where the area or item searched is "reserved for [the defendant's] exclusive personal use." See id. at 368. Other factors that have been considered in determining the legitimacy of an expectation of privacy in an item seized from an office include the employee's relationship to the item, whether the item was in the employee's immediate control when it was seized, and whether the employee took actions to maintain a sense of privacy in the item. United States v. Anderson, 154 F.3d 1225, 1232 (10th Cir. 1998). Many times, an employee may have a legitimate expectation of privacy in his or her personal office and in personal items stored in a desk or file cabinet. See O'Connor, 480 U.S. at 716-18.

Evaluation of an expectation of privacy in a

workplace computer involves unique considerations, but as with any other item in the workplace, the evaluation should focus on the operational realities of the workplace. When a computer is involved, relevant factors include whether the office has a policy regarding the employer's ability to inspect the computer, whether the computer is networked to other computers, and whether the employer (or a department within the agency) regularly monitors computer use. For example, in United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002), the court held that a university professor had no legitimate expectation of privacy in his office computer, partly because the university had an extensive policy regarding computer use and provided explicit warnings that the computer would be inspected by university officials. Similarly, in Muick v. Glenayre Electronics, 280 F.3d 741, 742 (7th Cir. 2002), the court observed that an employee had "no right of privacy" in the laptop computer his employer had "lent him for use in the workplace" because the employer had announced that it could inspect the laptop. We agree with these courts that where an employer has a clear policy allowing others to monitor a workplace computer, an employee who uses the computer has no reasonable expectation of privacy in it. In the absence of such a policy, the legitimacy of an expectation of privacy depends on the other circumstances of the workplace.

If these circumstances indicate that the employee has a legitimate expectation of privacy in the place searched or items seized, and the employee

has invoked the protection of the Fourth Amendment, the State must prove that the search and seizure was reasonable in order to use the evidence secured in the search and seizure at trial. See State v. Setzler, 667 So. 2d 343, 344 (Fla. 1st DCA 1995). A search and seizure is reasonable if it is conducted pursuant to a valid warrant or with valid consent. State v. Purifoy, 740 So. 2d 29, 29 (Fla. 1st DCA 1999). Law enforcement officers may obtain valid consent from the individual whose property is searched, someone who has common authority over the premises, or someone who reasonably appears to have common authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181, 188-89 (1990) (citations omitted).

"Common authority" is derived from "mutual use of the property by persons generally having joint access or control for most purposes." Rodriguez, 497 U.S. at 177. The legal justification behind the doctrine of common authority is that when two people have mutual use of property, each assumes the risk that the other will permit the area to be searched. See United States v. Matlock, 415 U.S. 164, 171 (1974). Even when a third party has the right to enter the property and inspect it for his or her own purposes, that person does not have constitutional authority to invite law enforcement officers to search the property unless he or she has common authority over the property. See Blanco v. State, 438 So. 2d 404, 405 (Fla. 4th DCA 1983) (noting that a landlord's personal right to enter an apartment was distinct from a right to invite police in to search the apartment).

In United States v. Ziegler, 474 F.3d 1184, 1191 (9th Cir. 2007), the court considered the consent issue in the context of a workplace computer and reasoned that "the computer is the type of workplace property that remains within the control of the employer 'even if the employee has placed personal items in [it].'" Standing alone, this statement suggests a blanket rule that employers always retain common authority over workplace computers. However, the Ziegler court's reasoning was fact-specific. See id. at 1192-93. Notably, in Ziegler, the company had an IT department with complete administrative access to all computers, the company had installed a firewall to monitor Internet traffic, and an employment manual informed employees of such monitoring efforts. Id. at 1192-93. Thus, like the standing inquiry, the question of whether an employer has retained control over a workplace computer sufficient to maintain common authority over the device depends on the operational realities of the workplace.

In some situations, a person who purports to consent to a search may not have actual authority to do so. Law enforcement officers may rely on that person's apparent authority to give consent, but only if such reliance is reasonable. See Rodriguez, 497 U.S. at 188-89. To determine whether an officer's reliance was reasonable, courts presume that the officer was familiar with the applicable law. See Morse, 604 So. 2d 496, 503-04 (Fla. 1st DCA 1992). Then, the proper inquiry is whether a reasonable person familiar with the applicable law would have

believed the third party had common authority over the premises or item searched. See Morse, 604 So. 2d at 503-04. If the basis for the asserted authority is unclear, the officer must conduct further inquiry before relying on the third party's representations. Id.

If the State fails to prove a search and seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial. Wong Sun v. United States, 371 U.S. 471, 484 (1963). Evidence that is not obtained during a search, but which is obtained as a result of the unlawful search, must be suppressed under the "fruit of the poisonous tree" doctrine. See id.; Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Evidence is not per se inadmissible "simply because it would not have come to light but for the illegal actions of the police," but the evidence must be excluded from trial if it "has been come at by exploitation of [the] illegality" and was not obtained "by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488 (citation omitted). Of course, it is the State's burden to show that the evidence sought to be suppressed was procured by appropriate means. To carry this burden, the State must show "an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action" by clear and convincing evidence. Norman v. State, 379 So. 2d 643, 647 (Fla. 1980). When the defendant seeks to suppress statements, the mere fact that the

defendant's statements were voluntary is insufficient, in itself, to meet this burden. See Oregon v. Elstad, 470 U.S. 298, 306 (1985) (stating that where a Fourth Amendment violation taints a confession, the State must meet the threshold requirement of showing that the confession was voluntary and then "show a sufficient break in events to undermine the inference that the confession was caused by" the violation).

Under the facts of the instant case, Young had a legitimate expectation of privacy in his office and his workplace computer. Thus, law enforcement could not properly access the contents of the office or the computer without obtaining a search warrant or valid consent. Because the officers did not have valid consent, the trial court properly suppressed the evidence obtained from the search.

The State contends, based primarily on Young's statements during the interview, that Young had no subjective expectation of privacy in the office or the computer. However, even considering those equivocal statements, we conclude that Young had a subjective expectation of privacy in the office and computer. This conclusion is based on a review of the totality of the circumstances. Young kept his office locked when he was away, thus taking specific measures to ensure his privacy in the office. When others used the office, the use was for limited purposes. The testimony at the suppression hearing indicated that Young expected no one to peruse his personal belongings in the office or on the computer.

Next, the State contends that Young's expectation of privacy in his office is not an expectation that society is prepared to accept as reasonable. We disagree. The Supreme Court has recognized that there are circumstances under which an employee may have a legitimate expectation of privacy in the workplace and the items contained therein. See O'Connor, 480 U.S. at 716-18 (finding a legitimate expectation of privacy in a government employee's office, desk, and file cabinets). The facts of the instant case indicate that the church had endowed Young with an expectation of privacy far beyond that which an average employee enjoys. Not only did the church install a special lock on the door, but it supplied only three keys to the door, two of which were in Young's sole possession. Additionally, Young had a recognized practice of allowing visitors into his office only with his permission or for limited purposes related to church business. Although Young's expectation of privacy would be more compelling if he had never allowed another person to use the office, such a condition would be unrealistic in any office setting. Young was required to have an objectively reasonable expectation of privacy, not a compelling expectation. It is difficult to imagine circumstances within a realistic business setting which would give rise to a more legitimate expectation of privacy.

Young also had an objectively reasonable expectation of privacy in his office computer. Although the church owned the computer, Young was the sole regular user. Although the church

administrator performed maintenance on the computer, there was no evidence that she or anyone other than Young stored personal files on the computer or used it for any purpose other than maintenance. Unlike in the federal cases finding no expectation of privacy in a workplace computer, the church in the instant case had no written policy or disclaimer regarding the use of the computer. See Angevine, 281 F.3d at 1132-33 (describing a university's extensive policy regarding computer use and monitoring); Muick, 280 F.3d at 742 (noting that an employer's announcement that it could inspect laptop computers "destroyed any reasonable expectation of privacy" the defendant may have had). Specifically, there was no policy informing Young that others at the church could enter his office and view the contents of his computer. The fact that Young's computer was not networked to any other computers further heightens the reasonableness of his expectation of privacy in its files. The only way to access the computer to view its contents was to enter through the locked office door. It is clear under these circumstances that the church trusted Young to use the computer appropriately and that it gave no indication that the computer would be searched by anyone at the church. The fact that Young violated this trust does not detract from a proper analysis of whether he had a legitimate reason to expect that others would not enter his office and inspect the computer.

Testimony at the suppression hearing revealed that the district superintendent had authority to

enter the office and inspect the computer under general provisions in the Book of Discipline, which gives district superintendents the responsibility to oversee pastors and local churches. While we do not doubt that the district superintendent had such authority, we observe that this general authority to supervise a pastor is distinguishable from an explicit policy indicating that a computer will be inspected periodically. Thus, based on the other facts of this case, Young's expectation of privacy was legitimate, even in the face of a church policy allowing the district superintendent to supervise him. All employees have supervisors, but many employees may still have a legitimate expectation that others will not examine their personal files, even if these files are brought into the workplace.

Although the district superintendent had personal authority to enter Young's office, and to authorize others to do so, this authority did not displace the law enforcement officers' obligation to respect Young's independent constitutional rights and it did not rise to the level of "common authority" required for valid third party consent. Neither Moreland nor Neal had ever used Young's workplace computer, worked in his office, or kept property there. Instead, the office was kept locked, and the church had no specific policy giving church officials the right to control and use the office. No testimony at the suppression hearing revealed that any church officials had ever exerted such authority over the office. Thus, the State failed to meet its burden to prove that the officials had common authority under

constitutional standards, and there was no showing that Young assumed the risk that church officials would invite police officers in to search the office.

The State contends that even if there was no actual authority for the church officials to consent, the officers reasonably relied on the officials' representations of authority. However, the officers' actions do not support a finding of apparent authority. By the officers' own admissions, they knew nothing of Moreland other than the fact that he was a "representative of the church" who had been told by a supervisor to consent to the search. Although the officers were presumably familiar with the law governing third party consent, they made no effort to ascertain whether the consenting officials had any regular access to or control over the office and the computer before commencing the search. Despite the clear indications of Young's autonomy at the church and the officers' lack of knowledge regarding the specific relationship between the supervisor and Young, the officers assumed that the supervisor had the authority to consent. Their actions were not reasonable under constitutional standards. See Rodriguez, 497 U.S. at 188-89; Morse, 604 So. 2d at 503-04 (noting that "[a]n officer cannot always assume an invitation to enter a room is necessarily authorized by the rightful occupant").

For the first time on appeal, the State argued that the trial court had no choice but to accept that the search was proper to avoid a violation of the ecclesiastical abstention doctrine. Because the

ecclesiastical abstention doctrine is an issue of subject-matter jurisdiction, Malichi v. Archdiocese of Miami, 945 So. 2d 526 (Fla. 1st DCA 2006), we feel compelled to address the State's concerns. Under the ecclesiastical abstention doctrine, civil courts are prohibited from interfering with internal church disputes in order to avoid excessive government entanglement with religion, in accordance with the First Amendment. See id. When matters of church discipline or ecclesiastical government arise between a church and its parishioners, secular courts must accept the decision made by the highest ecclesiastical authority. Id. (quoting Watson v. Jones, 80 U.S. 679, 733 (1871)).

In Malicki v. Doe, 814 So. 2d 347, 356-57 (Fla. 2002), the Florida Supreme Court recognized that the doctrine applies to intrachurch disputes, not those between a church and a third party. The Malicki court explained that the purpose behind the prohibition against resolving disputes between churches and their parishioners is to avoid having the state "intervene on behalf of groups espousing particular doctrinal beliefs." Id. (quoting Gen. Council on Fin. & Admin. of the United Methodist Church v. Cal. Superior Court, 439 U.S. 1355, 1372-73 (Rehnquist, Circuit Justice 1978)). Ultimately, the court held that there was no First Amendment bar to a suit initiated by parishioners against church officials under a theory of negligent hiring and retention for two reasons: the parishioners were not seeking to regulate conduct rooted in religious belief and the lawsuit was based on a neutral application of

a generally applicable principle of law. Id. at 360-61.

In the instant case, the State's reliance on the ecclesiastical abstention doctrine is misplaced primarily because the church is not a party in this case and there has been no attempt to regulate church conduct through the judicial system. This case did not require the trial court to determine whether the church officials exercised proper authority under church doctrine or otherwise interfere with the manner in which the church governs itself. Any interference in church governance posed by the instant case is far less significant than the interference Florida churches must tolerate under Malicki. Because churches can be sued for negligent hiring and retention, Malicki, 814 So. 2d at 360-61, churches have a legal obligation to exercise due care in selecting and supervising pastors. In contrast, the instant case does not require the church to conform any policies or conduct to a legal standard. The instant case merely requires law enforcement officers to consider the constitutional restrictions on their own behavior.

Notably, the trial court accepted Neal's testimony that the Book of Discipline gave him the authority to allow others into the pastor's office. In deeming the officers' acts unconstitutional, the court did not interfere with the church's authority or attempt to penalize any person for exercising it. Instead, the court took the limited and appropriate measure of excluding the evidence obtained from the search from use in a court of law. The church had

authority to implement its doctrine, but this authority did not extend beyond the realm of religion and did not remove from the court the prerogative of enforcing the rules of evidence and ensuring that government agents comply with the constitutions of the United States and Florida.

Finally, having established that law enforcement officers acted improperly in conducting the search of the office and computer, we turn to the facts surrounding the subsequent interrogation. The State contends that the statements were removed from the original taint because the church had already provided police with a CD containing "questionable images" prior to the search. We disagree. During the interview, the officers showed Young a printout of Web sites he had bookmarked and indicated that they had seized a "memory stick" from his office. Young testified that he was aware the officers had been in his office at the time of the interrogation. The State contends that the printout was from the CD the church had prepared. However, during the interrogation, the officers did not make this distinction to Young, although they clearly communicated to him that they had been in his office. Under these circumstances, we cannot say that Young's willingness to give incriminating statements was unaffected by the illegal search. The State has not pointed to any event or circumstance that broke the chain of illegality. Because the State failed to carry its burden, the trial court properly considered the statements "fruit of the poisonous tree." Like the items seized from Young's office and computer during

the search, the interview statements were properly suppressed. Accordingly, the trial court's order is AFFIRMED.

No further motions for rehearing will be entertained. The Clerk is directed to issue the mandate forthwith.

VAN NORTWICK and THOMAS, JJ., CONCUR.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA

Petitioner,

vs.

ERIC M. YOUNG,

Respondent.

On Petition for Writ of Certiorari to the
Florida First District Court of Appeal

APPENDIX B

Supreme Court of Florida

FRIDAY, JULY 11, 2008

CASE NO.: SC08-517
Lower Tribunal No(s).:
1D06-5798

STATE OF FLORIDA vs. ERIC M. YOUNG

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, and LEWIS, JJ., concur.

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HON. HENRY E. DAVIS, JUDGE

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(2)

No. 08-528

Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

ERIC M. YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF IN OPPOSITION

and

APPENDIX

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the district court decision affirmed a trial court order, supported by competent, substantial evidence, finding an illegal search by law enforcement officers (not "by a private employer" – as asserted by Petitioner), under facts clearly showing Respondent had legitimate and reasonable subjective and objective expectations of privacy in the location and objects of the search, was prevented from refusing consent to search, and based solely on third party consent obtained from individuals without actual or any reasonably reliable apparent authority, and no inquiry was made into third party authority to consent.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the district court decision did not consider creating a new exception to the exclusionary rule for evidence illegally obtained, as a result of law enforcement officers ordering the only person with standing to consent from the premises, and obtaining consent from a third party known to them to lack actual or apparent authority – especially where Petitioner failed to raise said federal question at the trial court or on plenary appeal.

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INTRODUCTION

Petitioner has failed to present any "compelling reasons" for a grant of certiorari in this case. Sup. Ct. R. 10. There is no decision by a state court of last resort on any federal question. The Florida Supreme Court merely declined jurisdiction. Pet. App. at B1. There is no conflict between the state district court opinion and any relevant decision of this Court or a federal court of appeals. Nor does the opinion decide any unsettled question of federal law. Sup. Ct. R. 10(b) and (c). Therefore, the Petition should be denied.

The State first argues the district court misapplied a properly stated rule of law, by finding the instant search to be illegal as violative of Respondent's Fourth Amendment rights. The State next argues, assuming, *arguendo*, the instant search is illegal, the district court misapplied the exclusionary rule as to the illegally obtained evidence. Petition at 25. As to the question of application of the exclusionary rule, Supreme Court Rule 14.1.(g)(i) requires specification of the stage in the proceedings when this federal question was raised. Ignoring this requirement, Petitioner failed to inform this Honorable Court that it did not raise the question of the application of the exclusionary rule in the trial court, or in the appellate process, until it sought rehearing after the district court decision at issue here was rendered and its plenary appeal denied.

The untimely assertion of this argument was emphasized in the responses to Petitioner's motion for rehearing in the district court, Petitioner's motion for rehearing *en banc*, and its Petition for discretionary review in the Florida Supreme Court.[1] The belated timing of this argument, amounting to a waiver of the right to seek review on the question of application of the exclusionary rule, resulted in the district court striking the request for review *en banc* (not merely denying it as claimed by Petitioner). Resp. App. at A-1. As the waiver of the right to review of this question was a state law procedural question, that issue should not be considered by this Honorable Court.

The first (and sole remaining) issue here is the validity of third party consent to a search, where a subjective and objective expectation of privacy exists. The district court properly found Young had a cognizable expectation of privacy, subjectively and objectively, in his private Pastor's Office and his office computer. Pet. App. at A13-14.[2] It then correctly

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[1] Not only was this a new argument by the State, it was made in reliance on case law long available to, but ignored by the State. Authorities advanced for the first time in the motion for rehearing, and not argued in a brief or oral argument, will not be entertained by a Florida appellate court. *Cartee v. Florida Department of Health and Rehabilitative Services,* 354 So. 2d 81, 83 (Fla. 1st DCA 1978).

[2] These factual findings are entirely accurate, and were arrived at by the trial court after extensive briefing, depositions of three different church representatives, consideration of ecclesiastical rules regarding the church, its property, and personnel, a full suppression hearing with testimony from all

(Continued on following page)

applied existing law governing the validity of third party consent, relying on *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and *United States v. Matlock*, 415 U.S. 164 (1974), as well as numerous state law precedents, determining that the instant third party consent was invalid. Pet. App. at A9-12. Thus, there is no "conflict" with the relevant decisions of this Court. These cases, contrary to the State's claim that existing law provides no guidance to law enforcement officers, set forth clear rules governing third party consent. The district court has not decided an unsettled question of law. Thus, the Petition should be denied.

STATEMENT OF THE CASE

Factual Misstatements

This was not a "search of a workplace by a private employer." Petition at 13. Rather, this search of the Pastor's private office was a search by law enforcement officers, thus fully implicating the Fourth Amendment. Thus, the entire premise of the Petition is a gross misstatement.

The search in question was of Young's locked, private office. Mr. Moreland testified the office had a "specific lock" because the church "wanted to make

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parties, including Young, and extensive argument. Further, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10.

sure that nobody could get in there unless it was the pastor." SRI 79.[3] The office "had a special lock that could not be opened by the Church's master key." Pet. App. at A3. The "church administrator acknowledged that no one was permitted to enter the office without Young's permission." *Id.* The State's claim that church trustees or parish staff had the right to use the spare key mischaracterizes testimony of the church administrator, who actually said she "guess[ed]" a "guest pastor who might need to be in there would have" been given access. RI 54. This hypothetical supposition is a far cry from any church "policy."

In fact, as the district court found,

> the office was kept locked, and the church had no specific policy giving church officials the right to control and use the office. No testimony at the suppression hearing revealed that any church officials had ever exerted such authority over the office.

Pet. App. at A16.

The State does not inform the Court that Young was present at the church just prior to commencement of the search, and he could have been asked for

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[3] Citations to the record on appeal below are by volume and page, in the form "RI pp.," where "R" is the record, "I" the volume, and "pp." the page number. Citations to the supplemental record on appeal below are by volume and page, in the form "SRI pp.," where "SR" is the supplemental record, "I" the volume, and "pp." the page number.

consent, but instead was ordered to leave by an armed police officer.[4] RI 117. In spite of the fact the police were preparing to search his private office, Young was never told of, nor asked to consent to, the impending search. RI 170. He was ordered home by an armed, uniformed deputy sheriff, and the detectives conducting the search knew this when they sought third party consent from Moreland.[5] RI 116-17.

The State's recitation of communications regarding Moreland's instructions from Neal, regarding cooperation with the police, mischaracterizes those instructions, as discussed below. However, those instructions are not significant, as would be clear, had the State informed the Court what the officers seeking consent to search knew of Moreland and Neal's authority and instructions, at the time they improperly relied on them. "Despite the clear indications of Young's autonomy at the church and the officers' lack of knowledge regarding the specific relationship between the supervisor [Neal] and Young, the officers assumed that the supervisor [Neal] had the authority to consent." Pet. App. at A17. The district court found that reliance on that

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[4] Had such consent then been sought from Young, it is uncontroverted he would have refused. RI 172.

[5] The principal detective conducting the search, Roman, also admitted she knew where Young was and could have sought his consent. RI 117.

authority was "not reasonable under constitutional standards." Pet. App. at A17.

That finding was based on the following facts, among others: (1) Moreland was not a trustee of the church (SRI 70); (2) only the church trustees have ownership authority over church property, including the computer (RI 82); (3) Moreland was never asked if he had such authority (RI 145), or if he was a trustee (RI 149); (4) Moreland was neither Young's boss nor his supervisor (SRI 74).

When Det. Boymer[6] asked Moreland to sign the consent, Boymer knew Moreland: (1) was not Young's supervisor; (2) did not have a key to Young's private office; (3) did not keep any of his property in Young's private office; (4) did not work in Young's private office; and (5) did not have use of Young's private computer. RI 149. Yet, Det. Boymer did not inquire or ask any follow-up questions to ascertain Moreland's authority. RI 144-45. He did not know what position Moreland held with the church (let alone his "authority" to grant consent).[7] RI 143. He only understood

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[6] The two principle law enforcement officers obtaining the "consent" and conducting the search were Det. Boymer, a Jacksonville Sheriff's Office officer, and Roman, a U.S. Customs and Immigration Enforcement special agent.

[7] At the time he had him sign the consent form, and prior to the search, Boymer had no idea what Moreland's position or authority was. RI 143. Other than knowing Moreland was a "representative and he was a complainant," Boymer "didn't know anything else about [Moreland's] role with the church or his position." RI 144.

him to be a "representative" of the church – hardly a position of common authority over the private, locked office and computer of the Pastor. RI 142. *See also* Pet. App. at A5, A16.

The State also provides an additional misleading claim as to the issue of consent, on page 6 of the Petition, stating Neal spoke to Roman and confirmed permission to search. The State fails to inform this Court that conversation took place "after [Roman] was already inside Young's office," and thus after the search had commenced. Pet. App. at A5. Aside from being untimely, the district court found Neal's authority was insufficient for him to be able to give valid third party consent. Pet. App. at A16.

Roman knew Neal did not possess keys to Young's private office, never used Young's computer, did not work in Young's private office, and did not keep property there. RI 115-116; Pet. App. at A16. Moreover, Roman had no recall of Neal consenting – only that he stated his desire to cooperate. RI 115. Thus, the record is clear that Roman did not assert either that she asked Neal to consent, or what authority he would have had to consent.

The State fails to inform this Court of another key fact. The consent to search form signed by Moreland prior to entry into Young's private office stated that Moreland was consenting to a "search of **my** property" and "**my** computer(s)." RI 17 (emphasis added). It is undisputed neither the office nor the computer searched were Moreland's, and the officers

knew that at the time they relied on that "consent." This search, claimed in error to be valid, was conducted on the authority of Moreland's consent to search **his**, rather than Young's office, and **his**, rather than Young's computer.

REASONS FOR DENYING THE WRIT

The decision below by a state court of last resort, the Florida Supreme Court, is a jurisdictional decision (declining jurisdiction), and not a decision on an important federal question, let alone one in conflict with another state court of last resort, or of a United States court of appeals. Pet. App. at B1. The district court decision does not decide an unsettled question of federal law, and is not in conflict with relevant decisions of this Court. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. Sup. Ct. R. 10.

There is no novel legal issue of first impression involved here. The State disingenuously claims the district court somehow held that an employer may not search the office of an employee. Pet. at 13-14. This claim is false. The issue here is not whether the Church could investigate Young, but whether State law enforcement officers had the right to search his private office and computer under the circumstances of the case. This is a run-of-the-mill examination of the consent exception to the requirement that a

search requires a search warrant. The district court properly applied existing (and adequate) federal and state law in its determination, and correctly found the instant search illegal, as violative of Young's legitimate expectation of privacy, and his constitutional rights.

I. The District Court Properly Found a Violation of Young's Fourth Amendment Rights

A. Young Had a Legitimate Subjective and Objective Expectation of Privacy in His Office and Computer

The district court, applying the proper constitutional standard for determining whether Young had a legitimate expectation of privacy in his private office and computer, concluded he had "a legitimate expectation of privacy in his office and his workplace computer."[8] Pet. App. at A13. Because Young prevailed on his suppression motion, the facts are reviewed in the light most favorable to him. *See, e.g., United States v. Cain*, 524 F.3d 477, 479 (4th Cir. 2008). *See also Ornelas v. United States,* 517 U.S. 690 (1996).

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[8] The district court applied *Smith v. Maryland*, 442 U.S. 735 (1979), for the rule that both a subjectively and objectively reasonable expectation are required. The court rightly found, citing *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987), that this conclusion is contextual, and dependent – under *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) – on the "'operational realities'" of the workplace. Pet. App. at A8.

The district court opinion, reviewing the totality of the circumstances, found Young took "specific measures to ensure his privacy in his office." Pet. App. at A13. Suppression hearing testimony showed "Young expected no one to peruse his personal belongings in the office or on the computer." Pet. App. at A13. Young's office had a "specific lock" because the church "wanted to make sure that nobody could get in there unless it was the pastor." SRI 79. The office "had a special lock that could not be opened by the Church's master key." Pet. App. at A3. The "church administrator acknowledged that no one was permitted to enter the office without Young's permission." Pet. App. at A3. Thus the district court properly found Young had a subjective expectation of privacy in his office and computer.

The district court also properly found Young's subjective expectation of privacy to be objectively reasonable. Pet. App. at A14. It found the "facts of this case indicate that the church had endowed Young with an expectation of privacy far beyond that which an average employee enjoys." Pet. App. at A14. It cited the special lock, and Young's "recognized practice of allowing visitors into his office only with his permission or for limited purposes related to church business," adding it would be "unrealistic in any office setting," to expect Young to never allow another person to use the office. Pet. App. at A14. This met the requirement that Young's expectation of privacy be "objectively reasonable." Pet. App. at A14. The district court, concluding, found it "difficult to

imagine circumstances within a realistic business setting which would give rise to a more legitimate expectation of privacy." Pet. App. at A14 (emphasis added).

As to Young's computer, the district court also properly found Young's subjective expectation of privacy "objectively reasonable." Pet. App. at A14. Citing *Mancusi*, *supra,* the opinion stated that legal ownership is not determinative of privacy, and the correct basis for that determination is workplace "'operational realities.'" Pet. App. at A14, citing *Mancusi* at 369. Young was the "sole regular user" of his computer. Pet. App. at A14. There was no evidence that anyone but Young stored personal files on the computer or accessed it for any reason other than maintenance. Pet. App. at A14.

Most significantly, the district court found the "church had no written policy or disclaimer regarding the use of the computer." Pet. App. at A15. "There was no policy informing Young that others at the church could enter and view the contents of his computer." Pet. App. at A15. The objective reasonableness of Young's expectation of privacy was heightened, the district court ruled, as the "only way to access the computer to view its contents was to enter the office through the locked office door," as the computer was not networked to any other church computers. Pet. App. at A15. Thus, the district court's conclusion that Young had a subjectively and legitimate objectively reasonable expectation of privacy in his office and computer is correct, and supported by the facts.

B. Search Invalid Without Young's Consent

Only Young had authority to consent to this search. Young had a valid and reasonable expectation of privacy in his desk, and in his computer, and therefore has standing to contest the validity of this search. As set forth above, an individual can have a right to privacy in his desk, and its contents, both at home and at work, even where the desk does not belong to him, and even where third parties have the right to enter the room where his desk, computer, and its contents are kept.

Where a mother had the authority to clean her adult son's room, but there was no showing that the mother had actual or apparent authority to authorize a search of the son's personal effects inside his desk, where it was not determined that she owned or used the desk, or had regular access to its contents, her consent to a search of the desk was held to be without authority, and invalid. *State v. Miyasato,* 805 So. 2d 818, 821-822 (Fla. 2nd DCA 2001), *rev. den.,* 807 So. 2d 655 (Fla. 2002), *mandamus den.,* 821 So. 2d 298 (Fla. 2002). Additionally, the *Miyasato* court held that, even if the mother had access for cleaning purposes, this would not amount to joint access and control sufficient to give her common authority to consent to a valid search.

Absent some showing of common authority (diminishing an individual's expectation of privacy in the desk's contents), no authority or third party consent would be valid. *Id.* Thus, not only does Young

have standing to object, and an expectation of privacy in his desk, its contents, and the computer (the modern equivalent of a filing cabinet), since there is no other individual with common authority or other significant connection to the property in question, only his consent would be valid authority for the instant warrantless search.

Miyasato, supra, cites *United States v. Blok,* 188 F.2d 1019, 1020 (D.C. Cir. 1951). *Blok* concerned a warrantless search of a government employee's desk, assigned to her exclusive use, in the government office where she was employed, conducted with the consent of her superior. The trial court in *Blok* held Blok "had a possessory interest in the desk assigned to her and the search of the desk by police was such an invasion upon her privacy as to constitute a violation of the Fourth Amendment." *Id.* at 1020.

Concurring, the circuit court affirmed, holding Blok's "exclusive right to use the desk assigned to her made the search of it unreasonable." *Id.* This was true, even though "a search of it without her consent would have been reasonable, if made by some people in some circumstances." *Id.*

The court opined that Blok's official supervisors "might reasonably have searched the desk for official property needed for official use." *Id.* There being no regulation prohibiting Blok from keeping personal property in her desk, no search for, or of, her personal property was allowed, absent Blok's consent. "Her superiors could not reasonably search the desk for her

purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable." *Id.* Affirming, the *Blok* court held the "police violated her right of privacy under the Fourth Amendment and the seized evidence should have been suppressed." *Id.* In the instant case, there was similarly no prohibition against Young keeping his personal property on his computer, the modern day analogue of the purse in *Blok*. The instant search was not for work-related materials, but a criminal investigation into Young's personal files.

Assuming *arguendo,* third party consent might have been valid to look for church documents, there was no such search made here. No individual of the church had the authority to consent to a search for or of Young's personal papers, documents, or computer files, absent his permission or a warrant. Accordingly, suppression, proper in *Blok,* is proper here. *Accord, Crawford v. Davis,* 249 F.Supp. 943 (E.D.Pa. 1966), *cert. den.,* 86 S.Ct. 923 (1966) (search of a locked desk owned by the Army, but used by defendant, based on consent by defendant's superior officer, improper, and evidence held illegally obtained.)

Here, the church had no internet usage policy, and no computer use policy. Young's activities were not monitored, and he was not on notice that his activities were subject to monitoring.

Young was in his office the day of the search, immediately prior to its commencement. He was available to be asked for consent. Had the police asked Young, consent would not have been given. RI 172. Additionally, the police had the right to seal the premises, from the outside, and obtain a search warrant, justifying their probable cause, *vel non*, to a judge, and thereby protecting Young's Fourth Amendment and Florida Constitutional rights. Instead, the police did neither. Knowing Young would not have consented to a search of his desk and computer, given an informed opportunity to do so, it is undisputed that he was ordered home by an armed, uniformed law enforcement officer. This was done because the police knew that, in his presence, and absent his consent, or a warrant, they could not search the office, or the computer. "A third party may not validly consent to a search where the person against whom the search is directed is present and objects thereto." *Pugh v. State*, 444 So. 2d 1052, 1053 (Fla. 1st DCA 1984), citing *Silva v. State*, 344 So. 2d 559 (Fla. 1997).

The police had no authority to order Young off the premises. His forcible removal was improper, and further grounds for suppression. The police may not remove the potentially objecting party to avoid a possible objection to a search. *Georgia v. Randolph*, 547 U.S. 103 (2006). Such consent is invalid – even if obtained from a party (cotenant) who had lawful authority to consent. *Id. A fortiori*, consent here was invalid, since neither Neal nor Moreland were

"cotenants" of Young's office, and they had no lawful authority to consent.

C. Third Party Consent to Search Invalid

1. Third Party Consent Was Without Actual Authority

Assuming *arguendo* that there could be valid third party consent to search Young's office, it is clear from the facts that neither Moreland nor Neal had authority to consent. The district court recognized this, finding Moreland's authority wholly derivative of Neal's, and finding Neal's authority "did not rise to the level of 'common authority' required for valid third party consent." Pet. App. at A16.

The district court applied the correct legal standard for its analysis, looking to see whether the third party consenting had "'[c]ommon authority'" over the office and computer, citing *Rodriguez*, *supra* at 181. Pet. App. at A10. This common authority, the district court stated, must be "derived from 'mutual use of the property' by a person with 'joint access or control for most purposes.'" Pet. App. at A10, citing *Rodriguez, supra* at 177. Also citing *Matlock*, *supra* at 171, the district court looked to the basis for the common authority derived from mutual use, namely the assumption of the risk by one party that the other will permit the area to be searched. Pet. App. at A10.

In the instant case, the district court properly found Neal (and Moreland) lacked common authority

or other sufficient relationship to the premises, and thus lacked authority to consent. Pet. App. at A16. "Neither Moreland nor Neal had ever used Young's workplace computer, worked in his office, or kept property there." Pet. App. at A16. Neither of them were Young's employer. Young was a salaried employee of the church, and paid by the parish council. RI 193. Moreland could not terminate Young's employment, and neither could Neal, or the Bishop (with whom Neal consulted). RI 94-95. Any complaint within the Church, relating to the issue of the image on his computer, would have to be the subject of an "ecclesiastical trial." RI 94. This would affect the Pastor's credentials only. RI 95.

Neal was not Young's employer. Neal's supervisory authority was limited only "to certain matters" relating to his duty to "lead and oversee the spiritual and temporal affairs" of the pastors in his district. He did not hire Young. RI 94-5. He could not fire Young. RI 94-5. He could not even suspend him. RI 94-5. Clearly there was no mutual use or other sufficient relationship between Moreland/Neal and Young's office or computer.

In the instant case, there was no mutual use of the property whatsoever, let alone mutual use by any two people with joint access, common authority, or any other sufficient relationship to the premises or effects to be inspected. Mr. Moreland did not (1) use the office, (2) use the computer, (3) supervise Pastor Young, (4) keep any property in the Pastor's Office, (5) clean the Pastor's Office, (6) have keys to the

Pastor's Office, or (7) have access to the Pastor's Office. Thus, he could not validly consent under *Rodriguez, supra*, and *Matlock, supra*.

Similarly, Neal did not (1) have keys to the Pastor's Office, (2) use the Pastor's Office, (3) use the Pastor's computer, or (4) work there. As noted, people were not permitted to go into Pastor Young's office without his permission or him being present. Thus, under *Rodriguez, supra,* and *Matlock, supra*, Neal did not have authority to consent.

2. Third Party Consent Was Without Apparent Authority

The district court properly found the search could not be justified on a claim of reasonable reliance on the consent of Moreland or Neal. Pet. App. at A17.

> By the officers' own admissions, they knew nothing more of Moreland other than the fact he was a "representative of the church" who had been told by a supervisor to consent to the search. Although the officers were presumably familiar with the law governing third party consent, they made no effort to ascertain whether the consenting officials had any regular access to or control over the office and the computer before commencing the search. Despite clear indications of Young's autonomy at the church, and the officers' lack of knowledge of the specific relationship between the supervisor [Neal] and Young, the officers assumed that the

> supervisor [Neal] had the authority to consent. Their actions were not reasonable under constitutional standards.

Pet. App. at A17, citing *Rodriguez, supra,* and *Morse v. State*, 604 So.2d 496, 503-04 (Fla. 1st DCA 1992).

As stated above, a reasonable belief of apparent authority is the only exception to a valid third party consent, where the third party lacks actual authority to consent to a search. *See, e.g., Rodriguez, supra. Rodriguez* frames the test thusly: "Would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party has authority over the premises?" *Id.*, 497 U.S. at 188. Where the situation is ambiguous, a law enforcement officer is charged with the responsibility of making additional inquiry into the authority of the person giving the consent to search. *Morse, supra* at 503.[9] "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Moore v. State,* 830

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[9] Here, there was nothing "ambiguous" about Moreland's lack of real or apparent authority. Boymer had him sign a consent form (for a search of "my computer(s)"), knowing he knew essentially nothing about Moreland's authority, but only that he was a "representative" of the church. Conversely, Boymer knew that Moreland had none of the indicia of common authority over the Pastor's Office (had no key, never worked there, never used the computer, etc.).

So. 2d 883, 885 (Fla. 2nd DCA 2002), citing *Rodriguez, supra.* Again, the standard is reasonableness, and **an unreasonable erroneous belief that a third party has authority to consent does not validate an otherwise illegal search.**

Where there is "no factual support for a conclusion that the officers possess a reasonable, albeit erroneous, belief that the person consenting . . . had the authority to do so, suppression is proper, and denial of a suppression motion reversible error." *Moore, supra,* at 886. The district court here followed the law and its order should be affirmed – particularly since Det. Boymer honestly conceded he had no belief Moreland had authority to consent – other than he was a "representative" of the church, and the "complainant."[10]

Neal's lack of authority is even clearer, and no officer could reasonably have relied on that authority. Additionally, it is undisputed that no contact was even made with Neal until after the search began. The taint of illegality was already on the search, and any (unsupported) assertion he consented in that

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[10] Importantly, Boymer never claimed he was relying on apparent authority; nor could he. Boymer candidly admitted he only knew Moreland as a "representative" of the church, and, conversely, knew Moreland had no key, never worked there, never used the computer, etc. In other words, the record fails to support the State's claim on appeal that Boymer had a reasonable, albeit erroneous, belief that [Moreland] had the authority to consent.

telephone call could not remove the fatal stain.[11] He was not legally endowed with the authority to consent, and there was no reasonable basis for the officers to believe he was so endowed. Hence, under no circumstances can Neal's alleged "consent" to search possibly suffice as a basis for any exception to the Fourth Amendment warrant requirement.

Where an officer does not "conduct an inquiry or elicit any facts upon which he could have reasonably determined . . . common authority . . . he will have been held to have acted unreasonably . . . and without valid third party consent." *Saavedra v. State,* 622 So. 2d 952, 959 (Fla. 1993), *cert. den.*, 510 U.S. 1080 (1994).

Roman spoke with Neal, who had no authority over any church property, including the computer.[12] RI 82. Roman knew Neal did not possess keys to Young's private office, never used Young's computer, did not work in Young's private office, and did not keep property there. RI 115-16; Pet. App. at A5. The search was already underway when Roman spoke to Neal. RI 115-16. Roman had no recall of Neal consenting – only that he stated his desire to "cooperate." RI 115. The record is clear that Roman never asserted that

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[11] As noted, Roman had no recall of him consenting – only that he stated his desire to "cooperate." RI 115.

[12] Roman testified this was the only conversation she had with Neal. SRI 200, lines 8-9; RI 114, lines 21-3. That conversation took place after she was already in Pastor Young's office, and had commenced the search. RI 114, lines 4-17.

she asked Neal to consent, or what authority he would have had to consent. Here, there could be no reasonable reliance on apparent authority, as properly found by the district court.

D. Petitioner's Cited Authorities as to Finding of Illegal Search are Inapplicable and Do Not Provide Compelling Reasons to Grant Certiorari[13]

1. *State v. Collins*

The State claims this case should be decided using the approach of the New Hampshire Supreme Court, in *State v. Collins*, 581 A.2d 69 (N.H. 1990). This is not a basis for granting certiorari. While *Collins* is a decision by a state court of last resort, the instant case is not, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[14] *Collins* is inapplicable, as the search there at issue was upheld on the basis of employer consent. There was no employer consent here. Consent in this case was from

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[13] The following section discusses the six authorities cited as precedent for granting certiorari and (presumably) overturning the district court decision here. While none of these cases provide any Rule 10 basis for certiorari, they do demonstrate the erroneous nature of the State's claim of a lack of existing precedent.

[14] *Collins* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

Moreland and Neal.[15] Neither of them were Young's employer.[16]

An examination of the facts in *Collins* shows its complete inapplicability. *Collins* involved a search of a company vehicle, and held the business owner (again, with common authority) could consent to its search. This is clearly factually different from the instant case. Again, neither Moreland nor Neal were the owners of Young's private office or Young's computer, and they certainly had no common authority over either. Further, the employee in *Collins* not only allegedly committed a crime, but breached his employment obligation as well. There is no allegation here that Young violated any policy relating to his internet usage, as it is undisputed there was no such policy.

The State's argument here is based on its notion that the church as the employer and owner of the property had the right to consent to the search. The trustees of the individual church were the owners of the property and the computer, and no representative of the trustees was ever contacted or involved in the

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[15] Moreland was not a trustee of the church. SRI 70. Only the church trustees have ownership authority over church property, including the computer. RI 82. Moreland was never asked if he had such authority, or if he was a trustee. RI 145, 149. Moreland was neither Young's boss nor his supervisor; nor could he fire him. SRI 70, 74. Indeed, Moreland was nothing more than the chair of a church committee. SRI 69.

[16] See §I C. 1., *infra*.

consent. Moreland was not a church trustee. Neal was not a church trustee, and any authority he had was irrelevant, as he was consulted after the commencement of the search. Thus, the instant search, unlike the search in *Collins*, was not based on employer consent, and *Collins* is inapplicable.

2. *U.S. v. Carter*

The State next points to *U.S. v. Carter*, 569 F.2d 801 (4th Cir. 1977), in support of its erroneous contention that this Court should grant certiorari. While *Carter* is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[17] *Carter* is also inapplicable, as it involves consent from a business owner of the business to search a company-owned truck. The fruits of the third party consent search were the subject of a motion to suppress. *Carter* stands for the proposition that a search "undertaken with the consent of one with dominion over the property" can be legal. *Id.* at 803. *Carter* relies on the common authority or sufficient relationship doctrine from *Matlock, supra*. This point of law is not in dispute, and is in no way disputed by the district court decision in the instant case.

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[17] *Carter* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

In *Carter,* the owner of a truck, who had common authority and access to the truck, was held to have sufficient authority to consent to a search thereof. It is undisputed that neither Neal, nor Mr. Moreland, owned Young's private office, or Young's private computer, or had any common authority over them, and that the officers knew that at the time of the search. *See also* Pet. App. at A16. Since the search in *Carter,* unlike the instant search, was based on consent from a person with common authority and access to the object of the search, *Carter* is inapplicable.

3. *U.S. v. Bilanzich*

The State next points to *U.S. v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985), in support of its erroneous contention that this Court should grant certiorari. While *Bilanzich*, like *Carter, supra*, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[18] *Bilanzich,* like *Carter, supra*, is also a case of owner consent, supporting the proposition that an owner of a business can consent to a search of an employee's office.

The precedential value of *Bilanzich* presumes Moreland (or Neal) were the "owners" of Young's private office, or the computer. They were not.

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[18] *Bilanzich* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

Moreover, the State's argument ignores the fact that, in *Bilanzich*, the co-owner of the hotel, who was found to have authority to consent to search there, was found to have the requisite control over and relation to the business office in question, since he directed his employee, Ms. Bilanzich, to conduct hotel business there. *Id.* at 296.[19] Additionally, the office in question was a mixed use/multi-purpose room, not only used by Ms. Bilanzich, the employee, but also by visiting physicians, psychiatrists, and welfare case workers, so the court held she had no expectation of privacy in the office. *Id.* at 297.[20] The facts are just the opposite here. This was Young's private office, and the district court decision here, that Young (unlike Ms. Bilanzich) had a legitimate expectation of privacy, is correct. Pet. App. at A16.

In the instant case, neither Mr. Moreland nor Neal were, nor claimed to be, property owners.[21] Additionally, the law is well settled that third party

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[19] Conversely, neither Moreland nor Neal had any control over or relation to the Pastor's Office or computer – as everyone has acknowledged – much less the authority possessed by the consenting owner in *Bilanzich*, namely, the authority to instruct Young (who was employed by neither Moreland nor Neal) to conduct business in that office.

[20] Conversely, neither Moreland nor Neal (nor others) made any use of the Pastor's Office or computer. Indeed, they did not even have access to it – as it was secured with a special lock and key for the exclusive use of Young.

[21] This fact also defeats any "apparent authority" argument as to this issue.

consent must be by one who possesses "common authority [with the defendant] or other sufficient relationship to the premises or effects thought to be inspected." *Id.* at 296. No one in Young's case had authority common or co-equal to Young's. *Bilanzich* reemphasizes the principle that the sole fact of ownership alone does not confer authority to consent. *Id.* at 297.[22] Finally, the search in *Bilanzich* was of and for company business records and information, which the employer himself, under the rationale of *Blok, supra*, has the right to do, rather than a search of non-work related items kept on work premises, as in the instant case. Thus, *Bilanzich* in no way casts any doubt on the propriety of the suppression order. It is inapplicable.

4. *Muick v. Glenayre Elecs.*

The State next points to *Muick v. Glenayre Elecs.*, 280 F.2d 741 (7th Cir. 2002), in support of its erroneous contention that this Court should grant certiorari. While *Muick*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R.

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[22] Again, it is noted that neither Moreland nor Neal owned either the office or the computer. Moreover, under the church rules, only the trustees had any ownership interest, and none of them were contacted.

10(b) is not a consideration favoring the Petition here.[23]

This reliance on *Muick* is curious, since it is on all fours against the State. Although the case does state that Muick had no expectation of privacy in his laptop, the State entirely ignores the rule of law leading to that conclusion. *Id.* at 743. The *Muick* court so ruled because Glenayre (the employer) had announced it could inspect the laptop it furnished for the use of its employees,[24] which destroyed any reasonable expectation of privacy that Mr. Muick might have had. *Id.* The *Muick* court continued, adding that the company had the right to attach any conditions to the use of a laptop they wanted to, and did. *Id.* In Young's case, no such announcement or reservation of rights was made, and no such usage conditions (such as being subject to a right to inspect) were ever set.

Even more importantly, *Muick* clearly states there **can be** "a right of privacy . . . in employer owned equipment furnished to an employee for use in his place of employment." *Id. at* 744. Young had such a right of privacy, and suppression was proper. This Court can deny certiorari on the sole basis of *Muick* alone.

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[23] *Muick* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

[24] This announcement was of the type Det. Boymer acknowledged was on his Sheriff's Office laptop – but not on Young's computer.

5. *U.S. v. Angevine*

The State next points to *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), in support of its erroneous contention that this Court should grant certiorari. While *Angevine*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[25]

Angevine is significantly factually distinct from the instant case, which demonstrates the correctness of the district court decision here. Unlike Young, Angevine was a public employee – a professor at a state university. The university had a comprehensive computer policy explaining appropriate computer use, warning employees about the consequences of misuse, and describing in detail official administration monitoring of the university's computer network.[26] *Id.* at 1132. Thus, the *Angevine* court affirmed the district court's holding that Professor Angevine had no reasonable expectation of privacy in his office computer. *Id.* at 1135.

In the instant case, Young was subject to none of the twelve conditions and limitations placed on

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[25] *Angevine* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

[26] The university's computer usage policy, in *Angevine*, included twelve distinct and extensive conditions, none of which are found in the instant case. *Angevine*, at 1132-33.

Angevine. Young, unlike Angevine, was subject to no reservations of rights, no monitoring, and no review of his computer usage. Contrary to Angevine's situation, no logs were kept of Young's computer use, and no notice given, or right reserved, to monitor or inspect Young's computer usage, let alone, as in *Angevine*, to report the results of any such monitoring, or inspection, to any one, much less law enforcement officials. Thus, the district court properly found Young had a reasonable expectation of privacy in the contents of his workplace computer.[27] *Angevine* does not support a grant of certiorari in the instant case.

6. *U.S. v. Ziegler*

Finally, the State cites to *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), in support of its erroneous contention that this Court should grant certiorari. While *Ziegler*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[28]

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[27] As can be seen, the cases dealing with computer searches clearly focus on the existence, *vel non*, of such a policy, and whether the employee was warned his computer was subject to monitoring by the employer. If so, no expectation of privacy likely exists. If not (as here), it does. The district court decision is consistent with that clear law.

[28] *Ziegler* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

The State's reliance on *Ziegler* is misplaced. Although both *Ziegler* and the instant case involve a tip from an employer to law enforcement about alleged child pornography, *Ziegler* turned on the determination that Ziegler could have no reasonable expectation that his computer was "free from any type of control by his employer." *Id.* at 1192.

This determination by the *Ziegler* court was based on the following facts: (1) the company had an IT (internet technology) department which gave the employer "complete administrative access" to every company computer; (2) the company installed a firewall for the express purpose of monitoring employee internet usage to "make sure nobody is visiting any [personal or prohibited] sites"; (3) the company engaged in routine monitoring of individual internet usage; (4) firewall logs were reviewed regularly and sometimes daily; and (5) upon hiring, employees were "apprised of the company's monitoring efforts through training and an employment manual, and they were told the computers were company-owned and not to be used for activities of a personal nature." *Id.* at 1191-92.

It was these factors that led the *Ziegler* court to determine that, as a result of its policies, practices and procedures, as well as the notice thereof to

employees, the company "retained the ability to consent" to the search in question.[29]

In the instant case, there was no IT department, no monitoring, no firewall, no log, no restrictions on internet usage, and no prohibition on personal use. The trial court clearly and properly found as fact that, "The church did not have a policy or practice which would cause [Young] to believe that his computer might be searched without his consent so long as he served as pastor." RI 38. The district court, affirming, underscored this finding. Pet. App. at A15.

The threshold analysis performed by the *Ziegler* court is also informative and instructive here. The *Ziegler* court, at 1189, stated that

> a criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a *legitimate* expectation of privacy in the place searched or the items seized. This expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy.

Ziegler's claim that he had a subjective expectation of privacy in his office and his computer was

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[29] It is also important to note there was no issue as to the authority of the consenting third party in *Ziegler*. In the instant case, the authority of Moreland (or Neal) to consent was absent. They had no "common authority" over the Pastor's private, locked office, or the computer inside.

uncontested. Similarly, Young had a subjective expectation of privacy in his office and in his computer.[30] Pet. App. at A13. The *Ziegler* court next focused on whether Ziegler's expectation of privacy in his office and workplace computer was "objectively reasonable," stating that, "in the private employer context, employees retain at least some expectation of privacy in their offices." *Id.* The court found evidence Ziegler's expectation of privacy was reasonable, because his office was not shared by co-workers and kept locked. In the instant case, Young's office was not shared by co-workers and was kept locked. Thus, Young, like Ziegler, had a reasonable expectation of privacy in his office. Conversely, Young, unlike Ziegler, also had a reasonable expectation of privacy in his computer. *Ziegler* does not support a grant of certiorari in the instant case.

II. The State's Contention that the Exclusionary Rule was Indiscriminately (and Incorrectly) Applied is Waived and Erroneous

A. Claim Waived

The State also contends, assuming, *arguendo*, that the instant search was illegal, the district court misapplied the exclusionary rule as to the illegally

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[30] This issue has never been contested in the instant case. Although Det. Boymer attempted to get Young to recede from this position, the court properly excluded this testimony, as the product of a cat-out-of-the-bag search.

obtained evidence. Petition at 25. As to the question of application of the exclusionary rule, Supreme Court Rule 14.1.(g)(i) requires specification of the stage in the proceedings when this federal question was raised. Ignoring this requirement, Petitioner failed to inform this Honorable Court that it did not raise the question of the application of the exclusionary rule in the trial court, or in the appellate process, until it sought rehearing, after the district court decision at issue here was rendered, and its plenary appeal denied.

The untimely assertion of this argument was emphasized in the responses to Petitioner's motion for rehearing in the district court, Petitioner's motion for rehearing *en banc*, and its Petition for discretionary review in the Florida Supreme Court.[31] The untimely assertion of this argument, amounting to a waiver of the right to seek review on the question of application of the exclusionary rule, resulted in the district court striking the request for review *en banc* (not merely denying it as claimed by Petitioner). Resp. App. at A-1. As the waiver of the right to review of this question was a state law procedural question,

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[31] Not only was this a new argument by the State, it was made in reliance on case law long available to, but ignored by the State. Authorities advanced for the first time in the Motion for Rehearing, and not argued in a brief or oral argument, will not be entertained by a Florida appellate court. *Cartee, supra*, at 83.

that issue should not be considered by this Honorable Court.

B. The District Court Properly Applied the Exclusionary Rule

The State, attempting to support its claim of indiscriminate (and erroneous) application of the exclusionary rule, cites *United States v. Leon,* 468 U.S. 897 (1984). *Leon,* as this Court is well aware, allows for a good faith exception to the exclusionary rule for police officers "acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Leon, supra,* at 900. However, the sole question presented in *Leon*, concerned officers acting in good faith executing a search warrant, issued by a detached and neutral magistrate (neither of which factors exist here), subsequently invalidated as unsupported by probable cause.[32]

The State is actually urging this Court to make new law – not to simply rely on *Leon.* It attempts to

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[32] Of course, there are four exceptions to the *Leon* rule, which do require exclusion. Thus, even the *Leon* relaxation of the exclusionary rule is not unlimited, and leaves intact the remedy of exclusion under those circumstances – one of which is the proposition that an officer cannot rely on a warrant when he knows his own affidavit is defective. Here, the officers knew their reliance on Moreland's consent was defective – thus eliminating any "good faith" reliance exception – even if this case involved a warrant – which it does not.

use *Leon* as a wedge, to now allow for a new exception to excuse illegal police conduct. This flies in the face of the rationale of *Leon* itself.

The reason the *Leon* court allowed the good faith exception was that "a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer." *Leon, supra,* at 913-14, citations omitted. Here, we have the "hurried judgment of a law enforcement officer," without any judicial safeguard – exactly the opposite of what the *Leon* court emphasized was essential. Thus, *Leon,* is entirely inapplicable, and provides no basis or support for the relief sought by the State.

The State then attempts to bootstrap its unsupported argument by citing *Hudson v. Michigan*, 547 U.S. 586 (2006). *Hudson* involved a violation of the "knock and announce" rule for search warrant execution. Again, in *Hudson*, there was a warrant, issued by a detached and neutral magistrate. The *Hudson* court properly found the "knock and announce" rule has "never protected [an individual's] interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* at 594. The interest violated in *Hudson* had "nothing to do with the seizure of the evidence." *Id.* In the instant case, the violation had everything to do with the seizure.

The benefits of suppression far outweigh its costs here. "The Fourth Amendment demonstrates a

'strong preference for searches conducted pursuant to a warrant.'" *Ornelas, supra,* at 699, citation omitted. The officers here could and should have sought a warrant.[33] They chose not to submit the evidence they had to the scrutiny of a neutral magistrate. Instead, an armed officer ordered Young out of his parish office, and the consent of an individual who clearly had neither actual nor apparent authority was obtained. This conduct cannot be sanctioned or overlooked. This is no mere failure to comply with an archaic formality. It is exactly the type of heavy-handed overreaching the exclusionary rule was crafted to prevent.

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[33] The state attempts to excuse the illegal conduct on that basis, citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). The Coolidge court held there was no search and seizure in that case. *Id. at* 489-90. Thus, *Coolidge* is entirely inapposite, as is *Burdeau v. McDowell*, 256 U.S. 465 (1921). *Burdeau* does not involve a government search.

CONCLUSION

The State has failed to assert any Rule 10 basis for certiorari review. There are no compelling reasons to grant the Petition. The State's claim that the instant search was lawful is wrong on the facts and wrong on the law. Their untimely claim as to misapplication of the exclusionary rule is both waived and incorrect. The Petition should be denied.

Respectfully submitted,

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Counsel for Respondent

No. 08-528

IN THE
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

ERIC M. YOUNG,

Respondent.

BRIEF IN OPPOSITION

APPENDIX

INDEX TO APPENDIX

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February 25, 2008 Order issued by the First District Court of Appeal of Florida Striking Motion for Rehearing En Banc.....A-1

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

February 25, 2008

CASE NO.: 1D06-5798
L.T. No. : 16-2005CF-9798-A

State Of Florida v. Eric M. Young

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellee's motion, filed January 23, 2008, to strike the State's motion for rehearing en banc is granted because the State seeks rehearing en banc based on grounds not cognizable under Florida Rule of Appellate Procedure 9.331(d)(1). The motion for rehearing en banc is stricken.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Christine A. Guard, A.A.G.
Mark S. Barnett
Mac Devon Heavener, III, A.S.A.
Curtis S. Fallgatter
Hon. Bill Mc Collum, A.G.
Hon. Jim Fuller, Clerk

co

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK [SEAL]